

IAN VERNON

**THE ULTIMATE NEW ZEALAND APPEAL AND
THE CONSTITUTION OF THE SUPREME
COURT**

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LAWS 505: PUBLIC LAW - EXPLORING THE EDGE

**LAW FACULTY
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ABSTRACT

This paper examines the proposed abolition of the appeal from decisions of the New Zealand courts to the Judicial Committee of the Privy Council. It begins with a historical overview of the Privy Council and then briefly outlines the competing argument both for and against abolition. The conclusion is that abolition is inevitable and that replacement options should therefore be considered. Five options are examined, the favoured model being a new Supreme Court to be placed above the Court of Appeal in the New Zealand court hierarchy. Particular emphasis is placed on innovative possibilities that could be utilised in constituting the Supreme Court bench, including the use of non-legally trained judges, elected judges and limited term appointments. The Maori dimension is also considered and legislation to implement all the above suggestions is proposed. The object of the paper is to generate debate on the new Supreme Court and to emphasise that new and innovative ideas should be fully considered before the constitution of the Supreme Court bench is finally decided.

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*The Sovereign, in virtue of the Royal Prerogative, is the "Source and Fountain of Justice". Hence follows the right that suitors have, in the last resort, to appeal against the judgments of the King's Courts in all parts of the Empire.*¹

I INTRODUCTION

After discussions with interested parties and a report from its Advisory Group, the government has recently announced its intention to introduce legislation into Parliament later this year to abolish New Zealanders' rights of appeal to the Judicial Committee of the Privy Council and replace that avenue of appeal with an appeal to a new Supreme Court of New Zealand.

The purpose of this paper is to examine just one facet of this decision, how the Supreme Court bench should be constituted and what the legislation establishing the new court should include. Before embarking on this discussion, however, a brief background to the Judicial Committee of the Privy Council will assist in placing the debate in context. I will then outline two important facets of the decision to abolish this right of appeal. First, the debate leading up to the proposed abolition and why abolition is considered desirable, and secondly the appellate models proposed to take the place of the right of appeal to the Privy Council and why a new Supreme Court is the favoured option.

II HISTORICAL OVERVIEW

As the opening quotation makes clear, the genesis of appeals to the Judicial Committee of the Privy Council was that the Monarch is the source of all justice.

¹ Foreword to the NZPCC (1840-1932), Butterworths, Wellington, 1938.

The Privy Council dates from Norman times² and today consists of over 300 members.³ Its original function was to advise the Sovereign on matters of State, but its importance has diminished over the years, particularly through the development of the Cabinet system. By convention, however, appointments⁴ to the "modern" Privy Council include all United Kingdom Cabinet ministers⁵ and also some senior members of Commonwealth Cabinets.⁶ Members of the Privy Council are entitled to prefix the words "Right Honourable" to their names.⁷

This paper is concerned with only part of the Privy Council: its Judicial Committee.⁸ Members are the Lord President of the Council,⁹ the Lord Chancellor, the Lords of Appeal¹⁰ and other Privy Councillors who have held high judicial office.¹¹ The judges of the New Zealand Court of Appeal are inevitably appointed to the Privy Council.¹² The Privy Council usually sits as a bench of five, and its decisions are by way of recommendations to Her Majesty.¹³ Although in theory Her Majesty could reject these Opinions, they are, by convention, never disputed.

Because the Royal Prerogative "extends to all parts of the Commonwealth of

² For a discussion of the history and development of the Judicial Committee of the Privy Council, see Peter Burns "The Judicial Committee of the Privy Council: Constitutional Bulwark or Colonial Remnant?" (1984) 5 Otago LR 503.

³ For a full list see the Privy Council's web site at <<http://www.privycouncil.org.uk>> (last accessed 16 May 2002).

⁴ Appointments to the Privy Council are made by the Sovereign and are for life. In practice, recommendations are made to Her Majesty by the British Prime Minister.

⁵ See ECS Wade and EW Bradley *Constitutional and Administrative Law* (10 ed, Longman, London, 1985) 243-4.

⁶ Including, for example, New Zealand's current Prime Minister.

⁷ For a full current list of Privy Councillors, see the Privy Council's website: <<http://privycouncil.org.uk>> (last accessed 16 May 2002).

⁸ Simply referred to as "the Privy Council" for the remainder of this paper
⁹ Who does not sit.

¹⁰ The Lords of Appeal are the same judges that hear House of Lords appeals.

¹¹ See s 1 of the Judicial Committee Act 1833 (UK) and s 1 of its 1895 amendment. New Zealand judges currently sitting?

¹² McGrath and Glazebrook JJ are yet to be appointed.

¹³ Judicial Committee Act 1833 (UK), s 3.

which the Queen is monarch as fully in all respects as to England",¹⁴ British settlers in New Zealand retained their rights of appeal to the Queen in Council. This appeal has existed in legal terms since the foundation of the Supreme Court in 1841.¹⁵ The New Zealand Court of Appeal was established in 1862 and, in 1871, provision was made for appeals from that court to the Privy Council, although the right of appeal directly from the Supreme Court¹⁶ still existed.¹⁷ The right of appeal is currently governed by two imperial statutes and three Orders in Council.¹⁸

Although many Commonwealth countries have now abandoned the Privy Council appeal, New Zealand retains it.¹⁹ It is perhaps notable that New Zealand is the last significant independent country to do so. The remaining countries and dependant territories are very small, and probably retain the right because of a lack of local resources necessary to establish an effective appeal court in their own jurisdiction. Conversely, countries that have now abolished the right of appeal include those to which New Zealand has particularly strong connections (both in terms of trade and legal precedent), particularly Australia and Canada.²⁰

Some New Zealand statutes expressly state that decisions of the Court of Appeal are final²¹ in which case both the Court of Appeal and the Privy Council are

¹⁴ *Halsbury's Laws of England* (4 ed reissue, Butterworths, London, 1996) vol 8(2), para 370.

¹⁵ Although, due to the enormous expense and inevitable delay involved in such an appeal, only two appeals from New Zealand were heard by the Privy Council and in the first 60 years (up to 1899) only 23 more followed.

¹⁶ Now known as the High Court.

¹⁷ The right still exists in some civil matters, although it is rarely exercised.

¹⁸ The Judicial Committee Act 1833; The Judicial Committee Act 1844; The New Zealand (Appeals to the Privy Council) Order 1910; The New Zealand (Appeals to the Privy Council) (Amendment) Order 1910; and The Judicial Committee (General Appellate Jurisdiction) Rules Order 1982.

¹⁹ For a full list of countries and dependant territories that have either retained or abolished the right of appeal, see Discussion Paper, "Reshaping New Zealand's Appeal Structure", Office of the Attorney-General, Wellington, 2000, App 2.

²⁰ Canada in 1949 (Supreme Court Act 1949, s 3) and Australia in 1986 (Australia Act 1986, s 11).

²¹ For example, the Resource Management Act 1991, s 308; the Employment Relations Act 2000, s 214; and the Children Young Persons and Their Families Act 1989, s 347.

precluded from granting leave to appeal.²² Subject to that caveat, in civil cases where the amount in dispute exceeds NZ\$5,000 an appeal to the Privy Council is available as of right.²³ In all other civil cases an appeal is subject to the leave of the Court of Appeal.²⁴ In the vast majority of cases the NZ\$5,000 threshold will give an automatic right of appeal and leave will not be required. Even where leave not available as of right and is refused by the Court of Appeal, the Judicial Committee itself may grant special leave.²⁵

One anomalous situation that merits particular mention is the possibility of appeals to the Privy Council directly from the Maori Appellate Court. Under the Te Ture Whenua Maori Act 1993, there is no provision rendering the decision of the Maori Appellate Court final, but neither is there any right of appeal to any other New Zealand Court. It is possible then to seek special leave directly from the Privy Council.²⁶ However, despite authority for the proposition that appeals from the Maori Land Court are appealable directly to the Privy Council,²⁷ this "right" of appeal is "not clear".²⁸ Clause 15 of the New Zealand Courts Structure Bill (1996) would (had it passed into law) have put this matter beyond doubt.²⁹

²² *Nunns v LCC* [1968] NZLR 57 (CA)

²³ See Alexander Haslam, "The Judicial Committee - Past Influence and Future Relationships" [1972] NZLJ 542, 543 where the author noted that the original amount of 500 pounds (set out in the 1860 Order in Council) remained unchanged until the 1970's. Interestingly, NZ\$5,000 is within the jurisdiction of the Disputes Tribunal: Disputes Tribunal Act 1988, ss 10, 13.

²⁴ Privy Council (Judicial Committee) Rules Notice, First Schedule, r 2(b). Leave may be granted on the grounds that the case raises issues of "great general or public importance", or if it "otherwise" merits an appeal to the Privy Council.

²⁵ Again on the basis of general importance: Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (UK), Schedule II, r 2.

²⁶ Such an application was made in *Te Runanganui O Te Tau Thu O Te Waka A Maui Inc v Ngai Tahu Maori Trust Board*. Leave was refused.

²⁷ *In the Will of Wi Matua* (1908) NZPCC 522; *De Morgan v Director-General of Social Welfare* [1997] 3 NZLR 385.

²⁸ Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002, App C, para 13.

²⁹ This clause introduced an amendment to Te Ture Whenua Maori Act 1993, permitting an appeal to the Court of Appeal. An appeal was to be subject to the leave of the Maori Land Court or the special leave of the Court of Appeal. The Bill was, of course, predicated on the abolition of the Privy Council Appeal, and the Supreme Court legislation should make similar

In the criminal jurisdiction, there is no right of appeal to the Privy Council. The Court of Appeal has no statutory jurisdiction to grant leave and so special leave must be sought from the Privy Council itself.³⁰ Leave is rarely granted.³¹

Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

There have been only six New Zealand criminal appeals to the Privy Council in the 160 or so years that the appeal has been available. Of these four were dismissed, one was allowed and one was withdrawn. At least seven applications for special leave to appeal in the criminal jurisdiction have been refused.³²

III THE ABOLITION DEBATE

Debate over the appropriateness of a London court³³ hearing New Zealand appeals has existed since early last century.³⁴ However, abolition of the right of appeal was not possible prior to the passing of the Statute of Westminster of 1931 (UK). This enactment gave Commonwealth countries the ability to abolish appeals to the Privy Council, and New Zealand gained this ability on its adoption of this

provision. A simple amendment to the Te Ture Whenua Maori Act 1993 would be required, to ensure that it was clear that an appeal could not be made directly to the Supreme Court.

³⁰ *Nicholls v Registrar of the Court of Appeal* (1998) 12 PRNZ 218 (CA).

³¹ *Re Abraham Mallory Dillett* (1887) 12 AC 459, 467 (PC).

³² These are the reported applications. It is highly likely that there have been other unsuccessful applications but, as the Privy Council is not required to give reasons for refusing leave, it would be difficult to obtain accurate statistics. For the purposes of this paper, it is sufficient to note that, as a general rule, special leave is not generally available for criminal appeals.

³³ The Privy Council has itself declared that it is a court: *Ibrahebbe v R* [1964] AC 900.

³⁴ When Williams J criticised the Privy Council as "four strangers sitting 14,000 miles away". His Honour went on to describe their "ignorance ... of [New Zealand] history ... legislation ... [and] practice" and concluded that the Privy Council exhibited "every characteristic of an alien tribunal": *Wallis v Solicitor-General* [1903] AC 173; (1903) NZPCC 730.

statute.³⁵

The inevitability of New Zealand abolishing the right of appeal has been mooted by many distinguished jurists over the years. For example, Eichelbaum CJ³⁶ said:³⁷

The demise of the Privy Council appeal is inevitable ... The notion that a fully self-governing nation should send its litigation for final determination to a tribunal sitting in a "foreign" State, composed of Judges lacking any intimate knowledge of the New Zealand way of life, has become increasingly quaint.

However, the decision to abolish the right of appeal must, in the end, be a political one. The National government came closest to achieving abolition when it produced the New Zealand Courts Structure Bill.³⁸ This Bill did not proceed due partly to a change of government and partly because of opposition from New Zealand First's Maori Members of Parliament.³⁹ However, the Bill is indicative of the approach to abolition at that time,⁴⁰ and it is interesting to note that had the Bill passed into law, New Zealand would have, as its final appellate court, the Court of Appeal. The favoured model now is a Supreme Court. This highlights the need to fully consider the options and open up the debate to all New Zealanders. Without full consultation, there is the risk of a final appellate court being established on the

³⁵ By the Statute of Westminster (Adoption) Act 1947

³⁶ As he then was.

³⁷ Rt Hon Thomas Eichelbaum "Brooding Inhibition - or Guiding Hand? Reflections on the Privy Council Appeal" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 112.

³⁸ Bill No 191-1, 1996. Ironically, the National party now oppose the abolition of the right of appeal to the Privy Council: Wayne Mapp, National Justice Spokesperson "Replacing Privy Council Lacks Support - National" (14 April 2002) Media Release.

³⁹ Colin James "Scales of Justice in our Hands with end of Privy Council" (16 April 2002) *The New Zealand Herald* Auckland, <<http://www.nzherald.co.nz>> (last accessed 17 May 2002). The issue of Maori opposition to the abolition of the Privy Council appeal is discussed below.

⁴⁰ R Miller (ed) *New Zealand Government and Politics*, Oxford University Press, Auckland, 2001, at 64.

basis "it seemed like a good idea at the time". The "good idea" in 1996 was the Court of Appeal being the final appellate court. It is now the proposed Supreme Court.

A vast amount of debate has taken place on the abolition issue and, although I am of the view that abolition is appropriate, it must be noted that there is a fairly even balance between the competing "pro" and "anti" abolition lobbies. As an example of this fine balance, of the 70 submissions received in response to the Attorney-General's recent discussion paper,⁴¹ 32 favoured abolition and an equal number favoured retention. The remaining six submissions were described as "neutral".⁴² It is abundantly evident that the arguments represent opposite views: the same basic reasons are given both for and against abolition, but different conclusions are drawn by each side.⁴³ There is not, therefore, any great scope for

⁴¹ Discussion Paper, "Reshaping New Zealand's Appeal Structure", Office of the Attorney-General, Wellington, 2000.

⁴² Discussion Paper, "Reshaping New Zealand's Appeal Structure", Office of the Attorney-General, Wellington, 2000, para 20.

⁴³ The arguments for and against abolition have been discussed widely over the years and are conveniently summarised in J J McGrath QC, "Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet Strategy Committee on Issues of Termination and Court Structure", Crown Law Office, Wellington, 1995, 10-12. The principal competing arguments are as follows:

For Abolition

- The appeal is inconsistent with national independence;
- The appeal results in a public perception of the New Zealand judiciary being less able than Privy Council judges;
- The Privy Council is geographically remote from New Zealand;
- The appeal inhibits New Zealand in developing its own legal principles;
- The high quality of New Zealand judges;
- The high costs of appeals;
- Links can be maintained through international legal conferences;
- There is no necessity for two levels of appeal.

Against abolition

- The decision to retain the right of appeal is, in itself, an exercise of national independence;
- Separation of the Privy Council judges from New Zealand allows greater detachment from local pressures;
- The "threat" of an appeal to the Privy Council limits the Court of Appeal's willingness to depart from English case law;
- Appeals to the Privy Council give access to some of the world's finest judges;
- There is no cost to the New Zealand taxpayer;
- New Zealand judges are able to sit with the top English judges;
- There would be insufficient resources in New Zealand to provide a second level of

swaying either side with arguments on the merits, and this is perhaps axiomatic. I do not propose to rehearse the arguments here, suffice to say that abolition must, in the end, be a matter of government policy.

In my view, abolition is the clear "winner". It accords with New Zealand continuing to develop its own national identity and assert its international independence.⁴⁴ It also reflects the approach of many of New Zealand's Commonwealth allies that have already abolished the right. The current government's decision to abolish the right of appeal is, in my opinion, both timely and appropriate. The remainder of this paper is, therefore, predicated upon the assumption that the right of appeal will be abolished.

The question then, is what will replace the Privy Council?

IV THE PROPOSED APPEAL MODELS

The decision to abolish the right of appeal is, in reality, a simple one. At its most basic level it can be accomplished by the insertion of one section in the Judicature Act 1908.⁴⁵ Indeed, the New Zealand Courts Structure Bill anticipated exactly this.⁴⁶ The question in the current debate is, of course, how to replace the

appeal.

⁴⁴ The Attorney-General's press release announcing the intended abolition of appeals to the Privy Council did not refer to this national independence aspect, but rather to easier access to the final appellate court (the proposed Supreme Court) and that court's ability to consider a wider range of matters: Hon Margaret Wilson, Attorney-General "New Supreme Court of New Zealand Planned" (15 April 2002) Press Statement; <<http://www.beehive.govt.nz> (last accessed 28 August 2002).

⁴⁵ Although other provisions will obviously be required including, for example, to deal with references to the Privy Council in other legislation and to state that the relevant Imperial legislation shall cease to have effect in New Zealand.

⁴⁶ The relevant clause was drafted as follows:

70A. Termination of appeals to Her Majesty in Council - (1) No appeal to Her Majesty in Council lies or shall be brought, whether by leave or special leave of any court or of Her Majesty in Council or otherwise, and whether by virtue of any Act of the Parliament of the United Kingdom or of New Zealand, the Royal Prerogative or otherwise, from or in respect of any criminal or civil decision of a New

Privy Council appeal in New Zealand.⁴⁷

Canada now looks to its Supreme Court as the ultimate appeal forum, and Australia its High Court. Both jurisdictions have at least two levels of appeal and that has been a major concern for New Zealand in finding a replacement for the Privy Council. The argument is that a first level of appeal deals with the correction of error, while the second allows the court to focus on the (legal) policy issues to enable clarification and development of the law. The main difficulty in achieving a second level of appeal in New Zealand centres on the fact that New Zealand has a small population. The question is simply whether this country can afford to replace the Privy Council?⁴⁸ The "economy" option is, of course, to simply have only one level of appeal where the matter originates in the High Court, as envisaged by the National government in its 1996 Bill.

In 1994 Mr McGrath QC (the then Solicitor-General) was instructed to report to the Cabinet Strategy Committee on the "constitutional, historical, jurisprudential and structural issues relating to the appeals to the availability of appeals to the Privy Council, including arguments for and against its retention and an evaluation of possible alternatives to it".⁴⁹ The report concluded:⁵⁰

the proposition that a two [tier] appeal system will produce greater

Zealand Court.

(2) It is hereby declared that the Court of Appeal is the final appellate court of New Zealand and that no further appeal shall lie to any other court in respect of any decision of the Court of Appeal.

⁴⁷ The political decision to abolish the right of appeal has now been made.

⁴⁸ The costs of administering the Privy Council are met by the UK Government, so the only cost is to the parties.

⁴⁹ Cabinet Strategy Committee paper CSC (94) M 34/4, 5 October 1994.

⁵⁰ J J McGrath QC, "Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet Strategy Committee on Issues of Termination and Court Structure", Crown Law Office, Wellington, 1995, paras 52-54.

justice in particular cases or a better articulation of the law than will a single appeal system is unconvincing ... [there is] an opportunity to take advantage of the reductions in delay and cost that come with a single right of appeal ... the public and private interest in putting an end to litigation outweigh the value of allowing a continuing search to see if greater justice can be found.

The result of this pragmatic report was the introduction, by the National party, of its 1996 Bill. As set out above, this Bill did not proceed and appeals to the Privy Council continued to be possible.⁵¹

The debate continued and again came to the political fore in 2000 culminating in December of that year with the publication of a Discussion Paper.⁵² This paper included "a set of guiding principles" to assist in the discussion.⁵³ From the above papers four possible models emerged,⁵⁴ all of which firmly placed the Court of Appeal at the apex of the New Zealand court system.

A No Replacement

This was to have been a simple termination of appeals to the Privy Council,

⁵¹ And, indeed, have continued to have been pursued.

⁵² Discussion Paper, "Reshaping New Zealand's Appeal Structure", Office of the Attorney-General, Wellington, 2000.

⁵³ Discussion Paper, "Reshaping New Zealand's Appeal Structure", Office of the Attorney-General, Wellington, 2000, para 25, Appendix 1. These were:

- recognising the Court of Appeal as New Zealand's final appellate court;
- promoting reflective development of the law
- recognising Maori values and the interests of Maori under the Treaty of Waitangi
- reflecting the nature of new Zealand society
- economic viability
- meeting the needs of the community
- maintaining the independence of the judiciary
- the effective use of resources
- simplicity
- efficient administration
- access to justice

⁵⁴ The 1995 paper proposed all four. The 2000 paper omitted the first option, but reiterated the other three.

but was rejected by the Solicitor-General in his 1995 report on the basis the Court of Appeal would not be "concentrating its resources on the most important cases".⁵⁵ This "do nothing" model is no longer an option, as divisions within the Court of Appeal have since been implemented.⁵⁶ The current "do nothing" option would result in the following model.

B Divisions Within the Court of Appeal

This option introduced the concept of "divisions" within the Court of Appeal. These would consist of three judges each for the criminal and civil divisions, with the full bench consisting of five (or seven) judges.⁵⁷ Whether the appeal was heard by a division or the full court, the decision would be final. The decision as to whether the appeal was heard by the full court was to be on the basis of the system that the judges themselves operated. This model was that envisaged by the New Zealand Courts Structure Bill and, in respect of divisions within the Court of Appeal, was implemented in 1998. The important point is that the Privy Council appeal was retained under the 1998 amendments but, the adoption of this model now would, in effect, be the "no replacement" option.

C Two Levels of Appeal in the Court of Appeal

As in the preceding model, divisions of the Court of Appeal would be introduced. Appeals would generally be heard by a divisional court with a possible second level of appeal to the full court. A "leapfrog" appeal was envisaged in

⁵⁵ See J J McGrath QC, "Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet Strategy Committee on Issues of Termination and Court Structure", Crown Law Office, Wellington, 1995, para 70.2.

⁵⁶ Divisions of the Court of Appeal were introduced by a 1998 amendment: Judicature Act 1908, s 58.

⁵⁷ The Court of Appeal must sit as a full court (of 5 or 7 judges) when the case is of "sufficient significance to warrant the consideration of the full court", is referred to it by a divisional court (Judicature Act 1908, s 58(6)) or is an appeal from a Court Martial Appeal Court: Judicature Act 1908, ss 58D and 58E.

"landmark or exceptionally urgent and important cases".⁵⁸

D *An Appellate Division of the High Court*

This involved the creation of an appellate division of the High Court (a bench of three High Court judges) with a second tier of appeal to the Court of Appeal. Again a "leapfrog appeal" was envisaged under this model.⁵⁹

E *Summary*

The last three models remain available possibilities for when (as now seems certain) appeals to the Privy Council are abolished. Model B could be implemented without any change to the current system, while models C and D would require only a relatively small amount of adaptation to the present structure. The perceived difficulty with the latter two models is that judges would be "judging" their peers. It seems that this (along with submissions favouring a second level of appeal now finding favour) is the reason why a further model has now emerged.

Interestingly (given the emphasis on Maori views in the later report discussed below) the then Solicitor-General did not consult with Maori on the abolition of appeals to the Privy Council. He considered that the Privy Council had no special legal status or role in relation to Treaty of Waitangi matters.⁶⁰

⁵⁸ See J J McGrath QC, "Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet Strategy Committee on Issues of Termination and Court Structure", Crown Law Office, Wellington, 1995, para 70.14; Discussion Paper, "Reshaping New Zealand's Appeal Structure", Office of the Attorney-General, Wellington, 2000, para 31.

⁵⁹ See J J McGrath QC, "Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet Strategy Committee on Issues of Termination and Court Structure", Crown Law Office, Wellington, 1995, para 70.20; Discussion Paper, "Reshaping New Zealand's Appeal Structure", Office of the Attorney-General, Wellington, 2000, para 37.

⁶⁰ Although the Solicitor-General noted that "I am of the view that the Government must confer with Maori interests and ensure Ministers are aware of their viewpoint on the Privy Council appeal before decisions are made on the government's policy in relation to ending appeals": J J McGrath QC, "Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet

F Consultation and a Fifth Option

In November 2001, the Attorney-General established an Advisory Group chaired by the current Solicitor-General, Terence Arnold QC, and this group reported back to the Attorney-General in March 2002.⁶¹ Its report was prefaced as follows:⁶²

The Advisory Group was not asked to comment on the desirability of abolishing or retaining access to the Judicial Committee of the Privy Council. It was asked to comment on how a court of final appeal above an intermediate appellate court might be structured.

Perhaps the most surprising thing to emerge from the consultation and submission process was an option never before seriously considered: a new Supreme Court to be placed at the apex of the New Zealand court system.⁶³ In fact, this option was actively rejected on several previous occasions, and it is notable that the first of the “guiding principles” (above) specifically recognised that the current Court of Appeal would be New Zealand’s final appellate court.

Although others consider the name of the court unimportant,⁶⁴ I think that it is a matter of considerable importance and should be given careful consideration. The name must reflect the status the new court of final appeal both in New Zealand

Strategy Committee on Issues of Termination and Court Structure”, Crown Law Office, Wellington, 1995, para 32.

⁶¹ The report was published in April 2002: Report of the Attorney-General’s Advisory Group “Replacing the Privy Council: A New Supreme Court” Office of the Attorney-General, Wellington, 2002.

⁶² Report of the Attorney-General’s Advisory Group “Replacing the Privy Council: A New Supreme Court” Office of the Attorney-General, Wellington, 2002, para 1.

⁶³ The name of the new court was arrived at by the Attorney-General’s Advisory Group: Report of the Attorney-General’s Advisory Group “Replacing the Privy Council: A New Supreme Court” Office of the Attorney-General, Wellington, 2002, paras 36-7.

⁶⁴ “The final court of appeal could be called the Supreme Court, or whatever. The name does not matter: Rt Hon Ted Thomas “Dialogue: Final Court to Reign Supreme” (7 December 2001) *The New Zealand Herald*, Auckland, <<http://www.nzherald.co.nz>> (last accessed 27 August 2002)..

and internationally. I would advocate the new court being called the "The Supreme⁶⁵ Court of New Zealand" as I consider it fulfils those expectations.

G *Conclusions on the Debate and the Options for Replacement*

The arguments both for and against retention of the Privy Council appeal have continued for many years, but it appears inevitable that this right of appeal will shortly be abolished. It is equally inevitable that, if the current government has its way, the appeal will be replaced with appeals to a Supreme Court. Although the Supreme Court is an option never before seriously considered, the establishment of a court at this level is in line with other similar jurisdictions and is clearly, in my view, the best way forward for New Zealand.

I have considered the obvious additional costs to the taxpayer of introducing a new appellate court in New Zealand⁶⁶ and compared those costs with the other mooted options: the "economy" models. Although implementing those economy options would involve little cost, it must be borne in mind that fiscal considerations should not be a deciding factor, and perhaps not a factor at all.⁶⁷ The important issue is to ensure that the right of appeal is viable and available to all New Zealanders. The benefits of a new Supreme Court will serve to satisfy litigants with

⁶⁵ Defined as "of highest status or power": IA Gordon (ed) *The New Collins Concise English Dictionary: New Zealand Edition* (Collins, Auckland, 1982) 1173.

⁶⁶ These will include infrastructure costs (buildings, staff, judges) as well as the administration costs which will be unlikely to be met solely from the court fees payable by the appellants if it is to be an accessible court.

⁶⁷ At present there is no cost to the New Zealand taxpayer for appeals to the Privy Council except, of course, where the Crown is a party and/or where legal aid has been granted. The discussion papers suggest that the average cost where the Crown appeals is approximately \$100,000 (double if a private litigant) and the Legal Services Board granted legal aid payments of approximately \$280,000 in 1998-1999 and a little over \$100,000 in 1999-2000. Even assuming that eight (the average number) cases were heard in a year all involving the Crown and a private litigant (\$300,000 for each appeal) the total cost would be \$3m. The cost to litigants would remain similar, the only real cost being that of travel and accommodation for counsel. The other costs would be similar in a Supreme Court environment. The cost of the Supreme Court would be in having more judges and the infrastructure generally.

a second level of appeal and also to retain the image of New Zealand's court structure as one favourably comparable with other international models. For the purposes of this paper, I assume that a Supreme Court will be established. The considerations that follow are therefore predicated on that basis.

V LEGISLATION TO ABOLISH PRIVY COUNCIL APPEALS

It is immediately obvious that the abolition of appeals to the Privy Council from decisions of the New Zealand courts must be implemented by legislation. The right of appeal is contained in legislation⁶⁸ and, as such, that right may only be removed by legislation. The question then arises as to what form the enabling legislation should take. In this paper I suggest concise and "plain English" legislation to deal with the issues arising from the abolition of the Privy Council appeal and the establishment of the new Supreme Court.

The Judicature Act 1908 currently governs the constitution of the High Court and the Court of Appeal. Given the age of that statute and its many amendments it is now less than easy to access, except by electronic means. There is considerable scope to make that statute more accessible by redrafting some of the more archaic and complex provisions, and the proposed changes to the final appellate structure in New Zealand would present a good opportunity to revisit and "tidy" that Act. There will be various issues in establishing a new Supreme Court that will particularly impact on the provisions relating to the Court of Appeal and, in view of the necessity to draft new legislation in any event, I propose a new Judicature Act. This Act would then deal with the High Court, the Court of Appeal and the Supreme Court and should, in my view, be entitled the Judicature Act 2002.⁶⁹

It should be noted that only some of the "key" sections of the new Act are

⁶⁸ Judicial Committee Act 1833 (UK), s 1.

⁶⁹ Referred to in the paper simply as "the new Act".

suggested below. A full and comprehensive draft of the proposed new Act is far beyond the scope of this paper but its content will need to be carefully considered before final drafting instructions are provided to the Parliamentary Counsel's Office.

In addition to the substantive issues outlined above, other ancillary matters must be considered and included in the new Act, particularly the need for regulations to deal with Supreme Court fees and Supreme Court rules. I propose that the Supreme Court Rules should be based on the current Privy Council Rules, but there will be a need to add and amend those rules so as to reflect the requirements of a New Zealand based court. Some issues concerning rules are discussed in context below but generally are outside the scope of this paper.

Finally, the new legislation must take account of the need for consequential repeals and amendments. A careful analysis of current general legislation⁷⁰ will be required, particularly to deal with references to the Privy Council and the rights of final appeal. These are also discussed in context below but again are generally outside the scope of this paper.

In short, the legislation will need to deal with the following basic, but essential, matters:

- Abolish appeals to the Privy Council
- Establish the Supreme Court of New Zealand
- State the date the Act will come into force
- Appeals currently being heard
- Appeals lodged but not yet heard
- Precedential status of Privy Council opinions in respect of New

⁷⁰ By which I mean all New Zealand Acts and Regulations currently in force.

Zealand appeals

- Consequential repeals and amendments

I suggest that all these essential issues be dealt with in the following concise sections:

XX⁷¹ Supreme Court of New Zealand established - (1) The Supreme Court of New Zealand is hereby established. This court shall be the final appellate court for New Zealand. The decisions of the Supreme Court shall, in all New Zealand cases (both civil and criminal), be final.

(2) This Act shall come into force on the [day, month year].

XX Appeals to Her Majesty in Council abolished - (1) Except as provided by paragraph (2) of this section, no appeal to Her Majesty in Council may be brought from any decision of any New Zealand Court after the commencement of this Act.

(2) Appeals to Her Majesty in Council may proceed where:

- (a) the appeal has been brought prior to this Act coming into force; or
- (b) prior to this Act coming into force the Court of Appeal has granted leave (or the Judicial Committee has granted special leave) to bring the appeal.

(3) As from the commencement of this Act, Opinions of the Judicial Committee of the Privy Council in respect of New Zealand appeals shall not bind the Supreme Court nor, where the Court of Appeal is the final appellate court, that Court.

(4) As from the commencement of this Act, the Imperial Acts and Regulations listed in the First Schedule to this Act shall cease to have effect in New Zealand:

⁷¹ "XX" is used in all my suggested provisions to denote a section number.

(5) As from the commencement of this Act, the Acts listed in the Second Schedule to this Act shall be amended or repealed in the manner set out in that Schedule.

The remainder of this paper deals with one major facet of establishing a new Supreme Court, namely how it will be constituted and how that should be dealt with in the legislation. Before discussing these substantive issues, however, a short consideration of the effect the Supreme Court will have on the Court of Appeal is appropriate. It is intended to highlight the "knock-on" effect that the new court will have on the constitution of the Court of Appeal and propose legislation to deal with this.

VI THE CONSTITUTION OF THE COURT OF APPEAL

The establishment of the Supreme Court will affect the current Judicature Act provisions relating to the judges Court of Appeal and how they sit in a relatively limited manner, and the key provisions of the new Act can probably be dealt with quite shortly.

The first matter is how the Court of Appeal should sit. With the introduction of the Supreme Court, I consider that the Court of Appeal should no longer be permitted sit as a full bench.⁷² Currently, the Court only sits as a full bench where the matter before it is:⁷³

- of sufficient significance to warrant the consideration of the Full Court.
- referred to the Full Court if the divisional court considers it "desirable".
- a decision of the Courts Martial Appeal Court.

⁷² Currently a Full Bench consists of either five or seven judges: Judicature Act 1908, s 58D.
⁷³ Judicature Act 1908, s 58D(4).

In my opinion, the Supreme Court should be given a wide jurisdiction (beyond that currently available in appeals to the Privy Council) to enable it to hear appeals from all civil and criminal matters, except where specifically limited by Parliament. In view of this proposal, the Court of Appeal should only ever sit as a bench of three judges (that is, as a divisional bench) because a right of appeal will usually⁷⁴ lie to the Supreme Court. Even where the Court of Appeal is expressed in the relevant legislation to be the final arbiter a bench of three would, I suggest, be appropriate.⁷⁵

Further, I propose that the Supreme Court should only ever sit as a bench of five.⁷⁶ If the Court of Appeal were also able to sit as a bench of five it would detract from the status of the Supreme Court as the apex of the New Zealand court system. I consider it an important aspect of the court hierarchy that the Supreme Court should always be the larger bench, thus adding authority to its decisions and also marking the court out to the public as "the" senior New Zealand court.

The current ability of the Court of Appeal to sit as a full bench should therefore be removed. If this is accepted,⁷⁷ there is scope for reducing the number of judges required for that court. However, in view of the enormous amount of work currently undertaken by Court of Appeal judges⁷⁸ and the pressure on those

⁷⁴ Except where Parliament has specifically limited the right of appeal to a lower court. This is currently the situation, for example, in appeals under the Resource Management Act 1991 where the Court of Appeal is stated in that Act to be the final arbiter: s 308.

⁷⁵ This is basically the current practice. In the vast majority of cases the Court of Appeal hears and determines appeals as a bench of three.

⁷⁶ Except perhaps on leave applications. This is also the conclusion of the Advisory Group: Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002, para 82.

⁷⁷ The Advisory Group concluded that the Court of Appeal should retain the right to sit as a bench of five, but "should rarely do so". It is not clear in exactly which circumstances it should sit as a Full Bench: Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002, para 82.

⁷⁸ For example, the Court of Appeal heard a total of 593 appeals in 2001: Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002, para 170.

judges to hear and determine cases I consider that seven Court of Appeal judges⁷⁹ should be retained until the full implications on the Court of Appeal's workload can be accurately assessed. The current reliance on High Court judges⁸⁰ also suggests that seven Court of Appeal judges is appropriate even though it is likely their workload will reduce with the removal of the ability to sit as a full court.

The seven judges should not include the Chief Justice who, in my opinion, should sit only in the Supreme Court.⁸¹ The Chief Justice's administrative role in the Court of Appeal should pass to the President of that court.⁸² This would be in keeping with the Supreme Court being separated from the lower courts. If the Chief Justice were responsible for the administrative functions of the Court of Appeal, it would tend to suggest a lack of independence between the two senior courts, independence being an important part of the public perception of a fair and unbiased appeal.

The retention of seven judges, at least until the actual workload of the Court of Appeal is known, would be prudent and ensure that it was adequately resourced with a sufficient number of judges to meet the new demands. In the meantime, benefits may emerge in terms of the Court of Appeal having a more manageable workload and less need to rely on High Court judges.

I propose that, if the number of Court of Appeal judges is to remain at seven, only one High Court Judge should be permitted to sit on a divisional bench, and then only where no Court of Appeal judge is available. There would of course need to be provision to allow two High Court judges to sit in "exceptional"

⁷⁹ Judicature Act 1908, s 57.

⁸⁰ Judicature Act 1908, s 58B.

⁸¹ Editorial "Interview with Mr Justice Eichelbaum on 12 January 1989" (1989) NZLJ 47.

⁸² Currently Gault P. I would also advocate the appointment of a President of the High Court to deal with the administration of that court.

circumstances.⁸³ If High Court judges were used less in the Court of Appeal there would also be obvious benefits in the administration of the High Court.

The main features of the above proposals should be dealt with in the Act as follows:

XX Court of Appeal Judges - (1) There shall be seven High Court judges appointed as judges of the Court of Appeal.

(2) The Governor-General, on the advice of the Attorney-General, shall appoint one of those judges to be President of the Court of Appeal.

(3) The President of the Court of Appeal shall be responsible for the judicial administration of the Court of Appeal.

XX Court of Appeal to Sit in Divisions - (1) The Court of Appeal shall continue to sit in criminal and civil divisions.

(2) Each division shall consist of three judges of the Court of Appeal and those judges shall be assigned to one or both of those divisions by the President of the Court of Appeal.

(3) The Court of Appeal shall cease to sit as a Full Court.

XX High Court Judge May Sit as a Temporary Member of the Court of Appeal - (1) A High Court judge may sit as a temporary member of a divisional bench, provided that judge has been appointed as a temporary member by the President of the Court of Appeal.

(2) No High Court judge shall sit where a Court of Appeal judge is

⁸³ By this I mean where there are insufficient Court of Appeal judges to sit due, for example, to illness or leave. The administration of justice would not be served by a rigid rule to allow only one High Court judge to sit in such circumstances.

available.

(3) Save in exceptional circumstances, no divisional bench shall consist of more than one High Court judge.

(4) In no circumstances shall a divisional bench consist of more than two High Court judges.

VII THE CONSTITUTION OF THE SUPREME COURT

The remainder of this paper focuses on the constitution of the Supreme Court bench and particularly how the judges should be selected and on what terms they should be appointed. I consider that all options for the number, qualifications and appointment of judges should be left open for consideration. The introduction of a Supreme Court presents New Zealand with a golden opportunity to explore a myriad of potential options, including the use of elected judges and non-lawyers on the bench. However, this would be a radical departure from the virtually universal acceptance that judges should be drawn only from the ranks of lawyers. Having said that, this traditional view is now open to challenge in New Zealand, and although some of the suggestions that follow may appear "radical" in terms of accepted practice, they are none the less viable and, I would argue, pertinent to achieving a representative and accountable judiciary.

A The Advisory Group's Report

The Advisory Group's report is premised on what may be regarded as a "traditional" approach to constituting a court. It envisages a Supreme Court consisting of a bench of five permanent judges (including the Chief Justice) all appointed by the method outlined below,⁸⁴ but at the same time reducing the

⁸⁴ Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New

number of permanent Court of Appeal judges from seven to six.⁸⁵

B Fundamental Requirements

My starting point is that the constitution of the Supreme Court bench should be wide open. At this early stage nothing should be ruled out. The government must ensure that what New Zealand gets is a Supreme Court that is worthy of that name. A broad-minded approach will ensure that all possibilities are examined and that this opportunity for New Zealand to finally take responsibility for its own ultimate appeals and does not result in a "missed opportunity" to be innovative through taking an overly conservative approach to the constitution of the new bench. New Zealand has the chance to set new international standards with its Supreme Court and all possibilities should be carefully considered. Some of the suggestions below have been considered by the Advisory Group but, for the reasons I give below, my conclusions do not necessarily accord with those views. Other suggestions I make in this paper are more novel and were not considered by the Advisory Group. It may well be that the Legislature will follow the "traditional" approach to judicial appointments, but this paper argues that other suggestions are at least worthy of consideration.

My conclusion is that the Supreme Court should comprise five full time judges. However, before discussing the possibilities for the constitution of the Supreme Court bench, some discussion of the current judicial appointment process is appropriate. The intention is to show how that system works and, more

⁸⁵ Supreme Court" Office of the Attorney-General, Wellington, 2002, para 85. Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002, para 196. This presumably does not include the Chief Justice and would result in a real reduction of two available Court of Appeal judges. Currently, the Chief Justice is a member of the Court of Appeal but is also able to sit in the High Court; Judicature Act, s 57(2)(a). If the proposed reduction were implemented, it would reduce the number of Court of Appeal judges by 25 percent. It assumes that the workload of that court would be manageable, as it would rarely sit as a full bench. The likely outcome, however, would be a greater reliance on High Court judges.

importantly, to suggest how it could be improved. An improved system could be utilised to appoint the crucially important first bench of the Supreme Court.

C How are judges appointed?

Currently, appointments to the judicial positions are made (on the basis of merit) by the Governor-General following recommendation by the Attorney-General.⁸⁶ A major consideration in the appointment process is the end result: the appointment of judges possessing both integrity and ability. For the purposes of this paper, the focus will be on the appointment of Supreme Court judges, but the considerations are equally pertinent to the appointment of High Court and Court of Appeal judges.⁸⁷ Although more transparent than it once was, the appointment process is still open to criticism for the elements of "secrecy" that pervade. Steps have been taken in recent years to render the process more open and, in 1999, Sir Douglas Graham⁸⁸ introduced the Attorney-General's Judicial Appointments Unit and advocated a set of "guiding principles" to be followed in appointing judges.⁸⁹

⁸⁶ Judges of the Employment Court and Community Magistrates are appointed on the recommendation of the Minister of Justice. Judges of the Maori Land Court and the Maori Appellate Court are appointed on the recommendation of the Minister of Maori Affairs: Leaflet "High Court Judge Appointments" (The Attorney-General's Judicial Appointments Unit, Wellington, 1999) 5.

⁸⁷ The Solicitor-General oversees the administrative process regarding the appointment of these judges.

⁸⁸ The Attorney-General at that time.

⁸⁹ Leaflet "High Court Judge Appointments" (The Attorney-General's Judicial Appointments Unit, Wellington, 1999) 2. The Judicial Appointments Unit was established to handle "expressions of interest" from those aspiring to the bench. The guiding principles are:

- (i) Clear and publicly identified processes for selection and appointment.
- (ii) Clear and publicly identified criteria against which persons considered are assessed.
- (iii) Clear and publicly identified opportunities for expressing an interest in appointment.
- (iv) A commitment to actively promoting diversity in the judiciary without compromising the principle of merit selection.
- (v) Advertising for expressions of interest, recognising that selection should not always be limited to those who have expressed interest.
- (vi) Maintaining, on a confidential database, a register of persons interested in appointment.

The basic requirement (and the only statutory requirement) is that any applicant must have held a practicing certificate for at least seven years.⁹⁰ It is then a question of "suitability" based largely on legal ability, character, personal skills and social awareness.⁹¹

The steps to judicial appointment begin with an advertisement for expressions of interest with a shortlist of respondents being placed on the Judicial Appointment Unit's register. As vacancies arise, the Solicitor-General consults⁹² with the Attorney-General, the President of the Court of Appeal, the Chief Justice and the Secretary for Justice and seeks input from a range of other interested bodies.⁹³ All candidates are then "rated" and a list of prospective candidates presented to the Attorney-General who then prepares a shortlist. The Solicitor-General is responsible for carrying out background checks on the candidates.⁹⁴ Once satisfied that the candidate is suitable,⁹⁵ the Attorney-General formally advises the Governor-General and the appointment is made.

This more transparent process marks a welcome improvement to the more secretive process used previously.⁹⁶ However, it does not go as far as the Judicial Commission suggested by the Law Commission,⁹⁷ nor the even broader group

⁹⁰ Judicature Act 1908, s 6.

⁹¹ Leaflet "High Court Judge Appointments" (The Attorney-General's Judicial Appointments Unit, Wellington, 1999) 6-7.

⁹² Other possible appointees may be considered at this time, even though they did not respond to a request for expressions of interest.

⁹³ Including the New Zealand Law Society, District Law Societies, the Criminal Bar Association, the Maori Law Society and women lawyers groups.

⁹⁴ Which includes a questionnaire and a declaration that the candidate will not, if successful, return to practice at the Bar. The purpose of the checks is to ensure, as far as possible, that the candidate is suitable for appointment.

⁹⁵ And, of course, is prepared to accept the appointment.

⁹⁶ Hon Paul East "The Role of the Attorney-General" in Philip A Joseph (ed) *Essays on the Constitution* (Brooker's, Wellington, 1995) 201-2.

⁹⁷ Hon Paul East "The Role of the Attorney-General" in Philip A Joseph (ed) *Essays on the Constitution* (Brooker's, Wellington, 1995) 202.

advocated by Professor Harris.⁹⁸

The ultimate appointing power has to be taken out of the hands of the Attorney-General and shared among a wider group that is more representative of the community. A specially constituted large Select Committee of the House of Representatives could perform this role ... Such a body would be likely to be fairly representative of the community ... It goes without saying that Judges should be selected so that the spread of gender, race and social background on the Bench reflects more closely that in the community.

I consider that public confidence in judicial appointments is only possible with a transparent process and a truly representative range of consultation. I agree with Professor Harris that wider consultation is necessary and note that the current system envisages consultation only within the legal profession.

By and large, the system works well in New Zealand and, despite some indiscretions highlighted by the media,⁹⁹ New Zealand judges are of extremely high integrity and the selection and appointment system is generally vindicated. However, the public perception of the judiciary is often less than what one would hope for,¹⁰⁰ and a new system of judicial appointment, perhaps first utilised in selecting and appointing the Supreme Court bench, would inevitably assist in raising the public perception of the judiciary.

Bearing the above points in mind, I now examine what I consider to be the

⁹⁸ B V Harris, "The Law-Making Power of the Judiciary" in Philip A Joseph (ed) *Essays on the Constitution* (Brooker's, Wellington, 1995) 280.

⁹⁹ For example, the concerns raised by Judge Beattie's trial: Vernon Small "Judges to go under the spotlight" (3 September 2002) *The New Zealand Herald*, Auckland, <<http://www.nzherald.co.nz>> (last accessed 27 August 2002).

¹⁰⁰ See, for example, Rt Hon S Elias "Judges must work on credibility: Chief Justice" (1 September 2002) *LawTalk* (484) 1, 3-4; Editorial "Chief Justice: public impression of the role of our judges and courts is a cause for serious concern" (March 2001) *Law News* (7) 89; and (generally) New Zealand Law Commission *Striking the Balance: Your Opportunity to Have Your Say on the New Zealand Court System* (NZLC PP51, Wellington, 2002).

most important aspects of the Supreme Court: the role of the Chief Justice, the number of judges required and how, and on what terms, judges of the Supreme Court should be appointed.¹⁰¹

D Role of the Chief Justice

The Chief Justice is the head of the New Zealand judiciary,¹⁰² and there has been no dispute that with the introduction of the Supreme Court the position of will be retained. The Chief Justice then will be both the senior New Zealand judge and, appropriately, the head of the Supreme Court bench. The role of the Chief Justice traditionally encompasses four elements:¹⁰³

- Upholding judicial independence.
- Managing the relationship between the courts and the other branches of government.
- Providing leadership to the judiciary.
- Administering the operation of the High Court.

A significant issue to arise from the abolition debate is what the role of the Chief Justice should be. The Advisory Group's report concludes that the Chief Justice should sit only in the Supreme Court,¹⁰⁴ although at present she is able to sit in either the High Court or the Court of Appeal. If the report's suggestion were adopted, she would preside over the Supreme Court and sit only in that court. In addition, she would retain responsibility for the judiciary generally.

¹⁰¹ Although the focus of my suggested appointment processes are on the Supreme Court, they are equally pertinent to the High Court and the Court of Appeal.

¹⁰² Judicature Act 1908, s 4.

¹⁰³ Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002 para 96; Editorial "Interview with Mr Justice Eichelbaum on 12 January 1989" (1989) NZLJ 47.

¹⁰⁴ Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002, para 105.

The argument that she should be able to sit in any of the courts¹⁰⁵ does have its attractions, particularly as it inevitably gives first-hand knowledge of the operations of those courts. However, against this must be balanced the role of the Supreme Court and the authority that the Chief Justice should have amongst the judiciary generally as well as in the eyes of the public. As an example of the authority that the Chief Judge should be seen to have, it would be undesirable to have her High Court judgments successfully appealed to the Court of Appeal and then, as a permanent member of the Supreme Court, being required to sit in judgment on the ultimate appeal from her own initial decision. If she upheld her initial decision (which would be expected) it may be seen as a failure to see any other viewpoint and the perception that the decision of at least one of the Supreme Court judges had been predetermined.

Conversely, if the Chief Justice were to come to a different conclusion in the Supreme Court, that would cast severe doubt on her ability as a first instance judge.¹⁰⁶ Similar considerations would likely arise if the decision were made in the Court of Appeal. This conundrum is currently avoidable, as the Chief Justice would not sit in the Court of Appeal where her own judgment was the subject of the appeal. There is a sufficient number of Court of Appeal judges to avoid this.

In my opinion, the Chief Justice sitting on the High Court or Court of Appeal bench would detract from the authority of her position as head of the Supreme Court and may also lead to the other undesirable consequences outlined above. To permit the Chief Justice to sit only in the Supreme Court would truly place her at the pinnacle of the judiciary. It would also enable her to have more time to fully consider (along with the other Supreme Court judges) the issues that will inevitably come before that court. The issues are likely to be complex in nature and will be

¹⁰⁵ By which I mean the High Court, the Court of Appeal or the Supreme Court.

¹⁰⁶ Assuming there was nothing new to justify such a departure. Even if there was, the public perception of vacillation would tend to remain.

demanding on the time of the Chief Justice. This strongly indicates that quite apart from any other considerations, she would simply not have time to sit any other than the Supreme Court.

My conclusion is in accordance with the Advisory Group's report. It is, however, appropriate that the Chief Justice should continue (as head of the judiciary) to oversee the judiciary generally and to carry on her current non-administrative responsibilities in this role. Although it would be possible to set out the Chief Justice's role in legislation, I view this as undesirable. The current "conventional" role of the Chief Justice allows flexibility in carrying out her role and, importantly, the functions are not encroached on or limited by the legislature.

The role of the Chief Justice as it is currently understood is quite consonant with her sitting only in the Supreme Court.

E *How many judges on the Supreme Court bench?*

I have already discussed what I consider to be the desirable and necessary changes to the Court of Appeal. My conclusion was that that court should sit only in divisions as benches of three, and the option of sitting as a full bench (of five or seven) should be removed. This leads to the question of how many judges should make up the Supreme Court. In view of what I have said above with regard to the Court of Appeal, a bench of five for the Supreme Court at all times seems appropriate.¹⁰⁷ It will always, quite properly, outnumber the Court of Appeal.

The fact that the Court of Appeal would only ever sit as a three judge bench would add authority to the decision of the Supreme Court and give finality to the

¹⁰⁷ Subject to leave applications, where I consider a lesser number of judges would be appropriate. This would assist in the effective administration of the Supreme Court, allowing two applications to be heard simultaneously if necessary.

matter for the parties involved. There is no justification for the Supreme Court to sit as a bench of seven but it should always sit as a five judge court on substantive appeals. This would serve to both distinguish it from the Court of Appeal in the eyes of the public and add authority to its judgments.

As an additional separation between the appellate courts, the Supreme Court judges should sit only in that court. This would emphasise their senior judicial standing and would accord with the practice of Court of Appeal judges sitting only in that court.¹⁰⁸ However, in exceptional circumstances,¹⁰⁹ it may be necessary to have a Court of Appeal judge sit on the Supreme Court bench as a temporary member. Provision should be made in the new Act for this eventuality, on similar lines to the provision allowing High Court judges to sit in the Court of Appeal.¹¹⁰ However, I do not consider that it would be necessary for a Court of Appeal judge to be appointed as a temporary judge of the Supreme Court, but rather permitted to sit on the invitation of the Chief Justice.

The five-judge bench of the Supreme Court is accepted by the Advisory Group, although a sixth member was mooted to cover sickness, leave and other such situation.¹¹¹ However, I consider this sixth judge unnecessary, principally (and contrary to the Advisory Group's conclusion) because I am attracted to the idea of overseas judges being utilised.¹¹² I also consider that the use of Court of Appeal judges on an "exceptional" basis would also remove the need for a sixth Supreme Court judge.

¹⁰⁸ With the current exception of the Chief Justice.

¹⁰⁹ "Exceptional circumstances" would be similar to those I suggest above with respect to High Court judges sitting in the Court of Appeal, namely illness, leave or other indisposition of a Supreme Court judge.

¹¹⁰ Judicature Act 1908, s 58A.

¹¹¹ Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002, para 85.

¹¹² I examine the use of overseas judges below.

I have considered whether it should be permissible for the Supreme Court to sit as a bench of three on substantive appeals,¹¹³ but have rejected this proposition as I consider it would be undesirable to allow an impression that certain Supreme Court decisions are of less authority. This is particularly so where (as is quite possible) the decision could have been different with five judges sitting: a 2:1 decision in favour of an appellant could have been a 3:2 decision against the appellant.

A bench of three would also likely be seen as "equivalent" to the Court of Appeal divisional benches, also sitting as three. Having at least three judges in agreement in the Supreme Court adds finality to the matter and is in accord with international practice, where the final appellate court is invariably the largest bench.¹¹⁴ In my opinion then, the Supreme Court bench should always sit as five, although leave applications may justify a smaller quorum.¹¹⁵

I consider the number of Supreme Court judges should be dealt with in the new Act as follows:

XX Judges of the Supreme Court of New Zealand - (1) Subject to paragraphs (2) and (3) of this section, the Supreme Court of New Zealand shall consist of the Chief Justice of New Zealand and four other judges of the Supreme Court.

¹¹³ The Advisory Group recommended that the court could sit as a bench of less than five in cases of emergency if the parties agreed: Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002, para 94. However, I consider that this would be undesirable given the precedential value that Supreme Court decisions will inevitably have.

¹¹⁴ For example the House of Lords, the Supreme Court of Canada and the High Court of Australia.

¹¹⁵ I think that the issue of leave applications should be left to the discretion of the Supreme Court. This should include the grounds on which leave should be granted and the number of judges that hear the application. I would envisage this could range from one judge (where the permissible grounds of appeal have been clearly set out by the court on previous occasions) to a full court (where the issue in question is novel or raises points that warrant consideration by the full court).

(2) In exceptional circumstances, the Chief Justice may invite a Court of Appeal judge to sit as a temporary member of the Supreme Court bench, but in no circumstances shall more than one Court of Appeal judge sit on that bench.

(3) Subject to section XX,¹¹⁶ an **overseas judge** of a **senior overseas appellate court**¹¹⁷ may sit on the Supreme Court bench.¹¹⁸

*F Tenure of Supreme Court Judges*¹¹⁹

The Advisory Group considered both the length of tenure and the retirement age of Supreme Court judges, but did not form an opinion on those matters, instead deferring it for future consideration.¹²⁰ However, I intend to draw conclusions on these and other related issues.

This section, then, considers how and on what terms the Supreme Court judges should be appointed (or as I propose below, elected) to the bench. Again, there are a variety of options, none of which can be readily rejected.

The first possibility is obviously to appoint Supreme Court judges on the same basis as other judges of the High Court and the Court of Appeal.¹²¹ If that were the case, Supreme Court judges would have “a job for life”, or at least

¹¹⁶ This is the section set out at the conclusion of my discussion on the use of overseas judges, below.

¹¹⁷ These terms should be defined, with “overseas judge” including retired judges and “overseas appellate court” meaning a court listed in the definition. These should include, as a minimum, the House of Lords, the Supreme Court of Canada and the High Court of Australia.

¹¹⁸ Time limitations may be required to exclude the possibility of an overseas judge becoming a “quasi” permanent Supreme Court judge. This should be dealt with in Rules rather than in the legislation, thereby avoiding a too prescriptive regime.

¹¹⁹ In this paper I advocate consideration of judicial elections. However, even if that suggestion were to be adopted, the appointments process would, in my view, still be appropriate for the pre-selection of candidates for judicial election.

¹²⁰ Report of the Attorney-General’s Advisory Group “Replacing the Privy Council: A New Supreme Court” Office of the Attorney-General, Wellington, 2002, para 132.

¹²¹ Leaflet “High Court Judge Appointments” (The Attorney-General’s Judicial Appointments Unit, Wellington, 1999) 6-7. Judicature Act 1908, ss 6, 57(3).

(barring the exceptional step being taken to remove them¹²²) until they reached retirement age.¹²³ This would be a simple option and would be in accord with the judges of the other New Zealand courts, and would ensure (as far as possible) that the following concerns were addressed:¹²⁴

If Judges do not have security of tenure, then there is a danger they will tailor their rulings to please the person who can terminate their position. If Judges do not have financial security, then they may be tempted to accept favours or the promise of future favours from those who have an interest in the litigation. And if Judges do not have a measure of institutional independence over at least the exercise of the judicial function, then the government can, for example, control which judges will hear which cases.

I do not think that there is any firm basis for these concerns. Tenure, security and independence are certainly crucial elements, but there is no reason why they cannot be achieved by means other than life appointments.

A number of issues arise in retaining the current appointment scheme, and perhaps a preliminary consideration is why there should be a retirement age to limit some of New Zealand's finest judges and prevent them continuing to sit where the only impediment is an arbitrary age limit.¹²⁵ The Supreme Court legislation could be an opportunity to remedy this situation, at least with respect to the Supreme

¹²² Constitution Act 1986, s 23.

¹²³ Judicature Act 1908, s 13.

¹²⁴ "A Place Apart: Judicial Independence and Accountability in Canada" (1995) Canadian Judicial Council 2: cited in Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002, para 126.

¹²⁵ For example, the vast experience of Richardson P has been lost to the New Zealand judiciary merely because of his age. This compulsory retirement age was reduced from 72 years to 68 years in 1981: Judicature Amendment Act 1981, s 3(1). There is a clear conflict between this provision and the (later) Human Rights Act 1993 (s 21). See, for general discussion, J McLean "Equality and Anti-Discrimination Law: Are they the Same?" in G Huscroft and P Rishworth (eds) *Rights and Freedoms* (Brooker's, Wellington, 1995) 263.

Court. There could be provision to enable judges to continue to sit with no limit on age subject, of course, to them being able and willing to do so.

Conversely, while attractive on the face of it, I consider this proposition undesirable in practice. It would likely lead to "stagnation", as a bench could remain in place for many years with no prospect (short of voluntary retirement, illness or death of the incumbent judge) of new judges being introduced. The compulsory removal of such judges would also likely be extremely contentious and with a judge resistant to removal the issue could become an embarrassment to both the judiciary and Parliament, thereby lowering the standing of the judiciary in the community. My conclusion is that the retirement age of 68 years should remain.

Allied to this is a point left open by the Advisory Group: whether it would be feasible to appoint judges to the Supreme Court for a set number of years. This could be achieved by way of limited term appointments of judges from the Court of Appeal or the High Court¹²⁶ to the Supreme Court, or even directly from practice to the Supreme Court.¹²⁷

There is certainly validity in the argument that it would be undesirable to have a practitioner appointed to New Zealand's ultimate court with no judicial experience but, in my opinion, the possibility should certainly be available.¹²⁸ It is important to note that one of the major concerns raised in opposition to the abolition of the Privy Council appeal is the lack of judicial talent in New Zealand. Given the relatively small pool from which judges can potentially be drawn, there is a real risk that a sufficient number of able judges would simply be unavailable to fill the bench. Further, I can see positive benefits of practitioners with current, and

¹²⁶ The "promotion" model.

¹²⁷ A similar system operates in respect of High Court Masters. Appointments are for initial terms of up to five years, with the possibility of reappointment: Judicature Act 1908, s26C.

¹²⁸ Such appointment is currently possible in relation to Court of Appeal appointments: Judicature Act 1908, s 57(3).

often expert, technical knowledge being utilised at senior appellate level even in the absence of judicial experience.

I consider that the "promotion" model would also tend to limit the introduction of "new blood" to the Supreme Court bench and perhaps promoting from within the judiciary as a first choice would limit the choices too far. The key consideration must be to ensure that the Supreme Court bench comprises the very best available judges. Several recent Privy Council appeals have resulted in Opinions that directly contradict the New Zealand Court of Appeal¹²⁹ and if the Court of Appeal was simply wrong (as opposed to there being a difference of judicial interpretation of the law) then doubt must be cast on the desirability of those same judges sitting in the Supreme Court.

Limited term appointments would have the decided benefit of overcoming the problems set out above, and particularly ensuring that judges could not exist in an ivory tower, becoming isolated from the community they should represent. This isolation would likely be more accentuated at senior appellate level, where it is quite conceivable that many appeals would be decided on the basis of "pure" legal argument without the court hearing the litigants themselves or their witnesses.

A fixed term appointment would assist in preventing this from occurring and also enable "new blood" to be introduced to the bench from time to time without the wait for retirement or death of the incumbent judge. A further benefit would be the enhanced perception in the eyes of the community of a merit-based bench serving the community and, importantly, retaining empathy with that community

¹²⁹ Most recently in *A v Bottrill* [2002] UKPC 44 (judgement was delivered on 6 September 2002). For criticism of the Privy Council by a former New Zealand Court of Appeal judge (Rt Hon T Thomas), see B Fallow "Judge slams Lord Lords' role" (23 May 2001) *The New Zealand Herald*, Auckland, <<http://www.nzherald.co.nz>> (last accessed 27 August 2002); Rt Hon T Thomas "Dialogue: UK court ignores the way things are" (6 December 2001) *The New Zealand Herald*, Auckland, <<http://www.nzherald.co.nz>> (last accessed 27 August 2002).

and reflecting its values.

The detriments of limited term appointments are readily evident but not difficult to overcome.¹³⁰ The principal barrier would be attracting candidates who would be prepared to accept such an appointment with the knowledge that it would not be a "job for life". This could be overcome, as Professor Harris suggests, by offering an increase in salary and, I would add, it would be possible to offset this increase in salary against the reduction in superannuation payments made to retiring judges. The return to practice of judges at the end of their term of appointment should present no real problem¹³¹ and loss of status is something that the appointee would be aware of in accepting the position and would, in any event, be likely to be experienced by any retiring judge.

In summary, I would advocate the introduction of limited term appointments to the Supreme Court bench. I consider that a term of perhaps seven years would be appropriate¹³² with the possibility of extensions where appropriate. The following provision sets out the essential matters, with the selection and appointment process being left either to an appointments committee:

XX Appointment of Judges of the Supreme Court of New Zealand

- (1) Judges shall be appointed to the Supreme Court of New Zealand for a term of seven years.

(2) Judges of the Supreme Court may be reappointed for further periods of seven years.

(3) Subject to subsection (2), upon the expiry of the time set out in

¹³⁰ B V Harris, "The Law-Making Power of the Judiciary" in Philip A Joseph (ed) *Essays on the Constitution* (Brooker's, Wellington, 1995) 281-2

¹³¹ Although the current practice of requiring a candidate to sign a declaration that he or she will not return to practice, would need to be removed.

¹³² This term being long enough to ensure that collegiality could exist and not so long as to run the risk of stagnation.

subsection (1) the Judge must retire from Supreme Court and may return to his or her previous occupation or practice.

(4) All judges of the Supreme Court must retire on reaching the age of 68 years.

If this system of limited term appointments were to be implemented, it would obviously need to be applied to all other courts at the same time. This would avoid the obvious reluctance of sitting judges to be appointed to the Supreme Court bench on less advantageous terms to those that they currently enjoy. The suggestion that I make above regarding higher salaries payable to Supreme Court judges may alleviate this problem in part, but more work will need to be undertaken on a judiciary-wide basis before such a system is finally implemented.

G *Appointment of non-lawyers*

What may perhaps be regarded as a fundamental limitation on the current judicial appointments system is the fact that it is predicated on the assumption that lawyers are the only ones able to carry out the functions and duties of judges. There is obviously a great deal of logic in appointing judges from a pool of experienced lawyers. Lawyers hold themselves out as being expert in interpreting and applying the law and are arguably the most able people to perform the role of judges.

On closer scrutiny, though, this argument is less clear cut. In the modern world of business and commerce, law practices are beginning to show a trend towards developing into multidisciplinary organisations, joining partnership with firms of accountants (for example) and thus being able to offer their clients a range of business-related services within the one firm. There are currently strict limits on the extent to which such firms can operate (and whether they can in fact operate at all in), but the trend is certainly towards such amalgamations. In view of such developments, it will become more and more difficult to sustain the argument that

judges may be drawn from the ranks of lawyers alone.

Even within the legal fraternity, the range of potential appointees to the bench is being widened. At one time, it was an invariable rule that only barristers would be appointed as judges, and this makes a degree of sense as not all solicitors would have the requisite litigation skills and knowledge to be able to sit in judgment of cases before them. However, that was never a valid reason for excluding those who did have such skills. It is now possible for solicitors and law professors to be appointed to the bench and Judges have now been appointed from these groups.¹³³ Although such appointees will usually possess the requisite litigation skills, it is quite possible for a purely "commercial" lawyer¹³⁴ to be appointed to the bench and then be required to sit in judgment over complex criminal trials, having little or no recent experience in such matters. The same can be said of a law professor, perhaps with little or no experience of litigation but a wealth of experience in analysing the law.

It becomes, then, a more compelling argument to say that an accountant (to give but one example) should be permitted to be considered for appointment to the bench. An accountant would be very likely to be fully conversant with tax and other financial legislation and, importantly, be expert in applying the rules to their clients proposed transactions. This is particularly pertinent to the Privy Council appeal where many of the cases are commercially orientated. It is highly likely that a significant number of the Supreme Court appeals will also be so orientated. In practice, lawyers will frequently seek the advice of such professionals where they themselves lack such skill.

In short, a valid argument can be made for extending the ambit of those

¹³³ Hon Paul East "The Role of the Attorney-General" in Philip A Joseph (ed) *Essays on the Constitution* (Brooker's, Wellington, 1995) 202.

¹³⁴ By which I mean not dealing with litigation.

eligible for appointment to the bench to a wider category of professionals.¹³⁵ In the context of the Supreme Court this may make good sense. It could be used to ensure that an even balance of professionals was represented at the pinnacle of the New Zealand court system and that a vast depth of knowledge in specialist areas would be available to determine the cases before the court. Being a "world first" in introducing such a system would place New Zealand in the forefront of international legal trends and obviously caution would be required before implementing such a system. However, the benefits are obvious: wider professional representation in the courts, depth of expert knowledge, a more equitable appointment process, professional expert input and, importantly, a wider pool of potential appointees.

One of the arguments for the retention of the Privy Council appeal (above) is that there are simply not enough able judges in New Zealand. This is, of course, easily refutable, but at least one commentator has based his argument for the lack of able judges on a per capita basis. In this article, the editor gives bland statistics to support his "one in five million" argument, the essence of the thesis being that each Lord of Appeal represents approximately five million citizens in the United Kingdom. On that basis, New Zealand would be able to muster less than one judge of the quality found in the House of Lords.¹³⁶ Whether this is a sustainable argument is a moot point, but by introducing a wider pool of potential candidates for appointment, the statistical bias is certainly reduced.

Any arguments as to the inappropriateness of non-legal professionals being appointed as judges can readily be dismissed by reference to other New Zealand (quasi) judicial tribunals, such as the Housing Tribunal, the Disputes Tribunal and

¹³⁵ Professor Harris has also alluded to this "provocative" suggestion: B V Harris, "The Law-Making Power of the Judiciary" in Philip A Joseph (ed) *Essays on the Constitution* (Brooker's, Wellington, 1995) 282

¹³⁶ Editorial "One in Five Million" (2001) NZLJ 89.

many other such bodies. Although the amounts of money involved are often relatively small, it must be remembered that the current limit for an appeal as of right to the Privy Council is \$5,000: less than the jurisdiction of the Disputes Tribunal.¹³⁷ In its recent discussion paper,¹³⁸ the Law Commission has invited comment on the structure of the courts and, although specifically not dealing with the proposed abolition of the Privy Council appeal, its general thrust is that formality in the justice system should be reduced. I think it quite proper to extend this ethos to the selection and appointment of judges and there seems to be no rational reason to exclude non-legal professionals from being considered as judges.¹³⁹

The fact that it is unlikely that the Supreme Court will hear many criminal appeals,¹⁴⁰ adds force to the possibility of non-legally qualified professionals being appointed. However, even where the case before the court is a criminal matter, there is no reason why a psychiatrist (for example) should not make as good a criminal judge as a commercial lawyer.

I have suggested legislation that would allow (although not require) the appointment of one non-legal professional to the Supreme Court bench. I advocate only one appointment on the basis that it will still be desirable to have the majority of the bench made up of professional lawyers, well-versed in legal analysis.

The criteria to be applied in selecting non-legally qualified candidates would

¹³⁷ Currently \$12,000: Disputes Tribunal Act 1988, ss 10, 13.

¹³⁸ New Zealand Law Commission *Striking the Balance: Your Opportunity to Have Your Say on the New Zealand Court System* (NZLC PP51, Wellington, 2002).

¹³⁹ For example, the New Zealand Law Commission Preliminary Paper refers to the number of legally qualified judicial officers acting as Disputes Tribunal referees (16 out of a total of 59) and Coroners (54 out of 64). The clear implication is that there are many non-qualified judicial officers making judicial decision in New Zealand, evidently without problem. New Zealand Law Commission *Striking the Balance: Your Opportunity to Have Your Say on the New Zealand Court System* (NZLC PP51, Wellington, 2002) 30-32.

¹⁴⁰ I base this on the current Privy Council approach to criminal appeals.

require considerable work by those responsible for the appointment of judges and I fully appreciate there will be enormous hurdles to overcome. However, there is no insurmountable reason why, in appropriate circumstances, such an appointment could not be made, and suggest the following provision:

XX Appointment of non-legally qualified persons as judges of the Supreme Court - (1) A non-legally qualified person¹⁴¹ may be appointed as a judge of the Supreme Court.

(2) The Supreme Court shall include not more than one non-legally qualified person.

The use of professional and specialist advisers should be available to assist the Supreme Court. This is a non-contentious suggestion, however, and is currently available to both the High Court and the Court of Appeal.¹⁴² I would propose that these provisions be extended to include the Supreme Court.

H Elected judges

The election of judges is, perhaps, the most contentious suggestion I make in this paper. However, I consider there is no reason why elections should not be permitted, even if only to the Supreme Court.

I fully appreciate the likely resistance to the concept of elected judges in New Zealand but see no overwhelming problem in introducing such a system, even at senior appellate level, and I consider the concept is worthy of further consideration. The challenge will be to design a process whereby there can be a pre-selection process to ensure that all candidates are worthy of appointment even without

¹⁴¹ This term should be defined to comprise members specific professional groups, who have held the appropriate practicing certificate for that profession for a minimum of seven years.

¹⁴² Judicature Act 1908, s 99.

elections and then to design safeguards to exclude partisan election "campaigns" and the making of statements that would be likely to mislead electors.

It should be noted at the outset of this discussion that this suggestion is an alternative to the appointment process discussed above. However, if judicial elections were to be implemented in New Zealand the appointment process would remain an important tool in the "screening" of potential candidates to ensure that only suitably qualified and experienced persons could stand for election. With this proviso in mind I consider whether the election of judges to the Supreme Court bench would be viable. Before doing so it is appropriate to place the discussion in context by considering the operation of judicial election processes overseas.

There are few jurisdictions where judicial elections are conducted,¹⁴³ but the notable example is the United States of America. As State courts vary and not all States have judicial elections, I have selected the State of Ohio as representative of how judicial elections operate.¹⁴⁴ The intention is to highlight the advantages and disadvantages of such a system, and to discuss whether it would be appropriate for electing judges to the Supreme Court bench.¹⁴⁵

In Ohio, there are three trial¹⁴⁶ and two appellate courts.¹⁴⁷ The election process is similar for judges of each of the courts, but there are some differences. In particular, election to the lower courts is by peer vote¹⁴⁸ and the candidate must be

¹⁴³ American Bar Association "Report and Recommendations of the Task force on Lawyers' Political Contributions: Part II" (1998, Chicago) 4. This may be a telling reason for not introducing such a system to New Zealand!

¹⁴⁴ For more information on State judicial elections, see <<http://www.ajs.org.us>> (last accessed 13 September 2002).

¹⁴⁵ Elections are not used for the Supreme Court of the United States. Instead, judges are appointed by Presidential nomination, with the advice and consent of the Senate.

¹⁴⁶ The Court of Common Pleas, the County Court and the Municipal Court.

¹⁴⁷ The Court of Appeals and the Supreme Court of Ohio.

¹⁴⁸ Meaning other judges.

resident in the appropriate county or district.¹⁴⁹ I do not consider that a residency requirement would be appropriate for candidates standing for election to the Supreme Court of New Zealand, due mainly to the national coverage of the court.¹⁵⁰ In addition, I consider that peer votes should not be the method of election for the very obvious reason that this would not instil public confidence in the judiciary, but rather lead to the perception that judges were accountable only to themselves.

The criteria that must be met before an Ohio candidate may stand for election to the judiciary is quite simple: the candidate must have practiced law for at least six years and be under 70 years of age at the date of the election.¹⁵¹ There is no pre-selection process in Ohio¹⁵² and so all suitably qualified candidates are entitled to stand for election. However, there are rules governing the conduct of campaigns, particularly regarding the making of inappropriate or misleading statements or personally soliciting or receiving campaign funds.¹⁵³ Elections are non-partisan,¹⁵⁴ but many interest groups promote their candidate and can have a significant effect on the outcome of the election.¹⁵⁵ This raises the spectre of judges becoming "mouthpieces" for their supporters and the diminution of judicial independence.

¹⁴⁹ This reflects the electorate: for the Court of Appeals (district based) candidates must be resident in that district, while for the Court of Common Pleas (county based) candidates must be resident in the relevant county.

¹⁵⁰ However, if elections were to be adopted for High and District Courts, residency requirements would be more viable.

¹⁵¹ The residency criterion described above is, of course, also relevant. These are not dissimilar to New Zealand requirements for consideration for appointment to the High Court discussed above.

¹⁵² Although some States do have a panel to prepare a shortlist: see, for example, New Jersey.

¹⁵³ Ohio Code of Judicial Conduct, Canon 7. The amount of money expended on Ohio judicial elections to the Supreme Court is limited to US\$350,000 (candidates for Associate Justices) or US\$500,000 (candidates for the Chief Justice).

¹⁵⁴ By which I mean that the candidates may not be endorsed by a political party.

¹⁵⁵ As an example of the influence of interest groups, in 2000 the Ohio Chamber of Commerce identified Justice Resnick (a candidate for re-election to the Supreme Court) as the least "pro-business" judge on the bench. On this basis, business interest groups spent considerable amounts of money in attempting to defeat Justice Resnick. Other groups supported the judge, however, and ultimately he was re-elected, albeit by a narrow margin.

Once Ohio judicial candidates have established that they are qualified to stand for election, they campaign for vacant positions on the bench.¹⁵⁶ Interim vacancies are temporarily filled by gubernatorial appointments.¹⁵⁷ Appointment is by a simple majority and the initial term of office, for the Supreme Court, is six years.¹⁵⁸ In all courts, re-election is for six years.

It is opportune at this point to highlight the "evils" of judicial elections. These have been identified as:¹⁵⁹

- Instability
- Campaign Finance abuse
- Diluted integrity
- Perception of attorneys "buying judicial favours"¹⁶⁰
- Undermining the role of the judiciary by inappropriate campaign speeches and behaviour
- Re-election diminishing judicial independence in decisions¹⁶¹

The American Bar Association has suggested the following measures to counter the above concerns:¹⁶²

- Amend the Code of Judicial Conduct
- Help voters make informed decisions

¹⁵⁶ Which may arise as a result of a sitting judge retiring, dying or being removed from office. Sitting judges seeking re-election campaign along with all other candidates.

¹⁵⁷ Meaning appointment by the State Governor.

¹⁵⁸ Initial appointment is for one year in the lower courts.

¹⁵⁹ Memorandum of the National Center for State Courts, "Judicial Elections and Judicial Independence Concerns" <<http://www.ncsc.dni.us>> (last accessed 6 September 2002).

¹⁶⁰ Through support of a particular candidate.

¹⁶¹ Research suggests that risk on failing in a re-election bid may have an influence on the judge's decisions. Uelman suggests that a death penalty conviction is more likely to be overturned where the tenure of the judge is secure: see G F Uelman "The Fattest Crocodile: Why Elected Judges Can't Ignore Public Opinion" (1998) Criminal Justice, 6.

¹⁶² American Bar Association "Report and Recommendations of the Task force on Lawyers' Political Contributions: Part II" (1998, Chicago).

- “Connect” with the community
- Ensure best campaign practices are followed
- Reform the election process
- Continue voter research

It is readily evident that elections can be fraught with difficulties, the most pressing being the risk of a diminution of judicial independence, particularly the possibility of influence by those prepared to finance or endorse a candidate and the risk of judgments reflecting popular opinion rather than an objective application of the law.

However, I consider that none of these problems are insurmountable, particularly if pre-selection of candidates were to be included in the process. A selection committee could be formed to include many of the considerations currently utilised in judicial appointments, but the constitution of the committee should better reflect the community.¹⁶³

There are certainly possible benefits in having an elected Supreme Court bench, not least the positive impact it would likely have in the eyes of the general public. There would be choice, as in Parliamentary and local authority elections, and judges would certainly be more accountable for their actions and decisions. Their continuing tenure would be dependant on convincing voters of their ability, and as part of their “electioneering” they would necessarily meet a wide cross-section of the public and hear, first-hand, their views. This would serve the dual purpose of educating the public and of demystifying the law. It would also ensure that non-performing judges did not remain in office indefinitely.

¹⁶³ Including a cross section of political and social viewpoints, to ensure (as far as possible) that candidates are both worthy of judicial employment if they should be successful and representative of the community at large.

I have also considered the issue of non-lawyers being elected and conclude that this could also work. As I discuss above, only one non-lawyer should be on the bench at any time, and so non-lawyers should only be permitted to stand for election when the "non-legal" judge was required to stand for re-election or otherwise left the bench. Lawyers would also be able to contest this vacancy.¹⁶⁴ I discuss the use of overseas judges below, but this will have no effect on the election process. I consider it imperative that enforceable rules are introduced to deal with the shortcomings identified in the Ohio model, but these should be formulated outside the legislation to allow for more flexibility. I have stated seven year terms of office to avoid "stagnation" on the bench and to make appointment more attractive to candidates considering a return to practice after the term of office expires.

I am attracted to the concept of national elections for judicial appointments to the Supreme Court of New Zealand: I consider they would reinforce the perception that the judiciary is accountable to the public (through elections) and also give the public a "voice" in deciding the constitution of the judiciary. Any perceived logistical problems in conducting an election could be overcome by running judicial elections as an adjunct to local and/or general elections.¹⁶⁵ In any event, judicial elections would involve far less organisation than general or local elections, and could be operated independently if required.

However, the problems identified above firmly lead me to the conclusion that the introduction of judicial elections in New Zealand would require very careful consideration and the risks of diminution of judicial independence may well be the deciding factor in rejecting this proposal. However, if the practical problems identified above can be overcome, the following provisions would be apt

¹⁶⁴ My suggested legislation advocates an option (not a requirement) to appoint non-lawyers.

¹⁶⁵ It is likely that judicial elections would be embraced by voters: New Zealand has a history of relatively high voter turnout for both local and general elections.

to implement the election process:

XX Election of Supreme Court judges - (1) Candidates may stand for election to the Supreme Court bench where one of the sitting judges:

- (a) retires, dies, or otherwise leaves the bench: or
- (b) is required to stand for re-election.

(2) No candidate may stand for election unless that candidate has shown, to the satisfaction of the election committee, that he or she possesses the skill, integrity and ability to perform the office of a judge of the Supreme Court.

(3) Election shall be by way of a national ballot, with the successful candidate being the one winning the most votes.

(4) Successful candidates shall be appointed to the Supreme Court bench by the Governor-General by Order in Council and shall, subject to any other enactment, serve an initial term of seven years.

(5) On reaching the end of his or her initial term, a judge may stand for re-election for a further term or terms of seven years.

(6) The Judicial Elections Rules shall apply to all candidates campaigning for election to the Supreme Court.

The appointment regime described above should be used to pre-select candidates for election and the current rules regarding the removal of judges retained.¹⁶⁶ In addition, strict rules relating to the conduct of candidates should be introduced. However, I reiterate that the crucially important point will be to ensure that the system is “policed” so that there is no detriment to judicial independence.

¹⁶⁶ Constitution Act 1986, ss23, 24.

There are many issues to be worked through in relation to an elected judiciary in New Zealand, and these are outside the scope of this paper. Suffice to say at this point, the possibility of elections should not be discounted.

I Overseas judges

The issue of using overseas judges on the Supreme Court bench was raised by the Attorney-General in her Discussion Paper.¹⁶⁷ The arguments for and against the use of such judges on the Supreme Court bench was considered by the Advisory Group, and its report recommended that overseas judges should not be appointed to the Supreme Court.¹⁶⁸ This was on several bases, including sufficiency of judicial talent in New Zealand, collegiality being undermined, problems with selecting judges and of operating a court including overseas judges.¹⁶⁹

However, having considered the arguments against the use of overseas judges, I see no reason why it could not work and suggest that such a system should be implemented. I am particularly attracted to the comments of Lord Cooke of Thorndon, who has advocated the inclusion of overseas judges on the bench of the Supreme Court both to add depth and overseas experience to the bench and to permit New Zealand judges to be in a position to exchange ideas with overseas colleagues.¹⁷⁰

¹⁶⁷ Discussion Paper, "Reshaping New Zealand's Appeal Structure", Office of the Attorney-General, Wellington, 2000, 10. This paper preceded the introduction of the Supreme Court as an option to replace the Privy Council.

¹⁶⁸ Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002, 36.

¹⁶⁹ The press have also taken this general tack. See, for example, Colin Keating "Dialogue: We have the skills to stand alone" (4 December 2001) *The New Zealand Herald*, Auckland, <<http://www.nzherald.co.nz>> (last accessed 27 August 2001); Michael Barnett "Dialogue: Imported judges can't replace London skills" (7 December 2001) *The New Zealand Herald*, Auckland, <<http://www.nzherald.co.nz>> (last accessed 27 August 2001); and Rt Hon Ted Thomas "Dialogue: Final court to reign supreme" (7 December 2001) *The New Zealand Herald*, Auckland, <<http://www.nzherald.co.nz>> (last accessed 27 August 2001).

¹⁷⁰ Lord Cooke of Thorndon "Final Appeal Courts: Some Comparisons" (New Zealand Centre for Public Law, Occasional Paper No 7, Dec 2001) 18-19.

Lord Cooke's suggestion is that the Supreme Court would consist of "a few permanent local judges and one or two overseas judges".¹⁷¹ His Lordship's "cardinal reason" for using overseas judges was that they would bring to the court "a wider perspective, derived from a wider experience than the purely local one". As a former President of the Court of Appeal and a Law Lord, Lord Cooke's experience and suggestions should not be lightly disregarded.

In his paper, Lord Cooke draws useful parallels with the Hong Kong Court of Final Appeal. That court was established on the termination of British rule in the former colony and is constituted of four local judges and one overseas judge selected from a panel of nine.¹⁷² The fact that the Hong Kong Court of Final Appeal is so similar to the constitution I propose for the Supreme Court of New Zealand adds weight to my argument that such a system could work in New Zealand.

The experience and ability of senior overseas appellate court judges from jurisdictions similar to New Zealand cannot be questioned. The prime source of judges would inevitably be from the United Kingdom, Australia and Canada: all jurisdictions on which the New Zealand places significant precedential value. They would bring an exceptionally useful depth of knowledge to the court and this reflects the current practice of Commonwealth judges sitting on the Judicial Committee.

Support for the use of overseas judges also comes from the New Zealand Law Society.¹⁷³ The Society considered that it was appropriate to "access the skill and

¹⁷¹ Lord Cooke of Thorndon "Final Appeal Courts: Some Comparisons" (New Zealand Centre for Public Law, Occasional Paper No 7, Dec 2001), 18.

¹⁷² Lord Cooke of Thorndon "Final Appeal Courts: Some Comparisons" (New Zealand Centre for Public Law, Occasional Paper No 7, Dec 2001), 18-19. Lord Cooke points out that three former New Zealand judges are "overseas" judges on the Hong Kong panel: Lord Cooke, Sir Edward Somers and Sir Thomas Eichelbaum.

¹⁷³ Christine Grice "Submission to the Attorney-General in Response to the Discussion Paper 'Reshaping New Zealand's Appeal Structure'", (New Zealand Law Society, undated) para

expertise of leading overseas jurists", and that the use of overseas judges might also meet the needs of Maori and the business community.¹⁷⁴ The Society was concerned to ensure that a New Zealand judge should always preside and that there should be set criteria for selection of overseas judges. I agree with these points.

I consider that it should be possible (although not mandatory) for the Supreme Court bench to include one overseas judge on the bench and I advocate the adoption of the Hong Kong method of using overseas judges, namely drawing judges from a panel as required. There would obviously be a great many practical issues to be worked through but these need not be set out in legislation, limiting that instead to the "enabling" provision that I have suggested below.

The use of overseas judges would not only enable an intimate exchange of judicial ideas internationally, but would prevent the collegiality of the Supreme Court from diminishing into "cosiness". In any event, my other suggestions would mean that there would be less emphasis on the concept of collegiality, and more on avoiding stagnation.

In practical terms, New Zealand judges could, for example, be seconded to the High Court of Australia and vice versa. It would also be possible to second an overseas judge where a Supreme Court judge was sick or to cover a vacancy due to retirement. However, there should always be five New Zealand judges of the Supreme Court even if this idea were implemented. This would ensure that the Supreme Court did not become reliant on overseas judges and could sit as a bench constituted entirely of New Zealand judges.

¹⁷⁴ 24. <<http://www.nz-lawsoc.org.nz>> (last accessed 27 August 2002). Although no detailed reasons were given.

I have considered how overseas judges should be selected and managed and in my view a panel of five overseas judges should be established. These judges should not be permanent members of the Supreme Court but used regularly on the bench to enable a wider perspective to be introduced to the decision making process. My suggestions for elections and non-lawyer judges would be unaffected by the use of overseas judges.

I anticipate that overseas judges would be used for set periods of time rather than on particular cases. However, the necessary legislation can be quite simply stated with the detail being developed independently and set out in formal rules. I propose the following provision:

XX Overseas judges - (1) There shall be a panel of five overseas judges, appointed by the Governor-General, each of whom shall, subject to the Supreme Court (Overseas Judges) Rules, be entitled to sit periodically as a member of the Supreme Court.

(2) Only one overseas judge may sit as a member of the Supreme Court at any particular sitting.

(3) The Supreme Court (Overseas Judges) Rules shall control and determine the use of overseas judges in the Supreme Court.

J Particular issues with first bench

Great care will need to be exercised in the appointment of the first bench. It seems an inescapable conclusion that all judges will need to be appointed simultaneously to the first bench and this may give the impression that those advising the Attorney-General could be biased. It would be possible, for example, to select judges on the basis of their previous pro-government policy stance in the past and the perception of a "loaded" bench must, at all costs, be avoided. The Court of Appeal and High Court benches comprise judges appointed over the years

on the recommendation of Attorneys-General of both major parties and, even if an accusation of bias could be made, it could not apply to all appointments over so many years.

How then will the first bench be selected? Logically, they will be selected in the same way as High Court and Court of Appeal judges. This selection process has stood the test of time, but has also been criticised for the lack of representation of various sectors of society.¹⁷⁵ The important difference here is that the entire bench will be appointed at the same time. Although the appointment process is conducted on a strictly non-partisan basis and one trusts that political bias in appointments would not be a factor, that perception may emerge. In view of this, perhaps there should be, in the process of appointing the first bench, wider input before the Governor-General (on the advice of the Attorney-General) makes the appointments. This may also be an apposite time to revisit the issue of transparency in the judicial selection and appointment process.

It may be that the answer would be to undertake wider consultation and this would also tend to satisfy the need for wider representation on the bench. Names of potential appointees could also be invited from the wider community and, as discussed above, need not be limited to the "traditional" places, namely the ranks of the senior legal practitioners. The major concern for the purposes of this paper is the appointment of the entire Supreme Court bench at one time, but the considerations here could also be utilised in future appointments. In this respect, the judicial elections that I advocate above may be advantageous in dispelling concerns of bias.

A further option, that would avoid the entire bench being appointed simultaneously, would be to allow appointments to take place over a period of

¹⁷⁵ Sir Geoffrey Palmer "Judicial selection and accountability: Can the New Zealand system survive?" (1993 Legal Research Foundation Seminar, Auckland, 5-6 August 1993).

time. In the early stages, perhaps only the Chief Justice should be formally appointed to the Supreme Court bench, with the remaining judges being drawn from the Court of Appeal and, if required, from the High Court. This would have the benefit of giving the opportunity to "test" differently constituted benches and for the judges to decide whether they would wish to be appointed to the new bench. After all, the Supreme Court will be significantly different from the Court of Appeal, particularly in terms of its workload and the "mature considerations" it is likely to engage in. This, of course, raises a great many problems, principally how it would work in practice and how it could be achieved without major disruptions on the lower courts.

Using High Court or Court of Appeal judges as suggested above would have serious "knock on" effects in those courts, with High Court judges being required to be appointed to the Court of Appeal on a temporary basis to cover the temporary absences that would inevitably occur with Court of Appeal judges being seconded to the Supreme Court. On balance, this process would be very unwieldy and the opportunity of working relationships developing to any great extent in a bench so constituted would be significantly reduced as compared with a permanent bench. It would also prolong the period of uncertainty that would exist until a permanent bench was finally appointed and call into doubt the precedential value of decisions delivered during that time.

There are also likely to be different dynamics in the Court of Appeal and the Supreme Court. For example, the Court of Appeal has an enormous workload¹⁷⁶ and is often under pressure to produce decisions swiftly. On the other hand the Supreme Court, as envisaged, will hear only 40 to 50 appeals each year¹⁷⁷ and so

¹⁷⁶ In 2001 the Court of Appeal heard a total of 593 appeals: Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002, para 170.

¹⁷⁷ Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002, para 5.

will have a significant amount of time to reflect on the issues without the same pressures that are present in the Court of Appeal. Whether this would suit all judges is debatable. Concern has been expressed that the Supreme Court would, in fact, be under-utilised,¹⁷⁸ a view shared by Lord Cooke.¹⁷⁹ If this were to be the case in practice it is easy to conceive that judges would find the work of the Supreme Court unfulfilling. There is then, a likelihood that different skills and abilities will be expected of Supreme Court judges and this will need to be a factor in selecting judges for that court.

In practical terms, it seems then that the only option is for all the new Supreme Court judges to take office simultaneously. This would ensure that when the first appeal is heard by that court, all the judges are permanent members of that court. This will have the effect of both conveying that the bench is "the" Supreme Court and that there was no chance of a differently constituted bench coming to a different decision.

There will, however, be enormous challenges in ensuring that the first Supreme Court bench appointments are well made and wide consultation will be necessary. It is very likely that the initial bench will remain for at least seven years if my suggestions are implemented and, short of any action justifying removal, the appointees will be the final arbiters of the law in New Zealand for that period. In addition, care must be taken not to decimate the current Court of Appeal by making appointments from that bench on the basis of their significant appellate experience.

My suggestion for the first bench is to "promote" the current Chief Justice to the Supreme Court but on her current terms of judicial appointment to ensure that

¹⁷⁸ Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002, para 84.

¹⁷⁹ Lord Cooke of Thorndon "Final Appeal Courts: Some Comparisons" (New Zealand Centre for Public Law, Occasional Paper No 7, Dec 2001) 20.

there would not be a Constitutionally embarrassing refusal of the Chief Justice to accept the position. On Elais CJ's retirement, the new Chief Justice should be appointed on the basis discussed above. The remaining four judges would be appointed for seven years at the outset and, despite future appointments occurring at the same time, eventually they would become staggered through, for example, judges reaching the mandatory retirement age or not being reappointed. The following provision would deal with this.

XX Initial Judicial Appointments - (1) The Chief Justice of New Zealand shall be appointed as the President of the Supreme Court. This appointment shall be on the terms no less advantageous than those currently enjoyed by the Chief Justice.

(2) On the retirement of the Chief Justice described in subsection (1) or when that Chief Justice otherwise ceases to sit as a judge of the Supreme Court, the office of Chief Justice shall be filled in the manner set out in section XX [the appointments provision, above] of this Act.

(3) The remaining four judges of the Supreme Court shall be elected to the Supreme Court and section XX [the appointments provision, above] shall apply.

K *Maori representation*

The significant remaining question as to the constitution of the Supreme Court bench is what, if any, specific recognition should be afforded to Maori. It is abundantly evident that Maori are significantly underrepresented, as a proportion of the population, in both the legal profession generally and particularly in the judiciary. The higher up the court structure one progresses, the more evident the lack of Maori representation becomes. As alluded to above,¹⁸⁰ retention of the

¹⁸⁰ In the context of one of the arguments for retention of the Privy Council appeal.

Privy Council has been seen by many in the Maori community as desirable, particularly as that forum represents a direct link to the Crown and is seen therefore as particularly important in the context of appeals relating to the Treaty of Waitangi. There is also a perception that Maori receive a more sympathetic hearing from the Privy Council.

Maori have been exceedingly concerned at the proposed abolition of the right of appeal to the Privy Council.¹⁸¹ The argument is that the Privy Council is the last "link" to the Monarch and as such it is of great significance to Maori. There is also a perception that Maori receive a more favourable hearing before the Privy Council than before the New Zealand Courts, particularly in matters concerning the Treaty of Waitangi. However, there has never been Maori representation on the Privy Council and whether Maori actually received a more favourable hearing is open to debate.¹⁸² Whether these arguments are well-founded are unlikely to sway the government in its decision to abolish the appeal, but they have certainly led to wider consultation than the insufficient effort criticised by Bennion in his article.

These concerns were specifically addressed by the Advisory Group and the result was a recommendation that Maori be represented on the Supreme Court bench by a judge well versed in the Maori language and culture.¹⁸³ Whether this will be practical or desirable in practice is debatable. The question then arises as to whether this is an apt solution to Maori concerns or whether it is a token gesture to remove or reduce Maori opposition to abolition of the Privy Council appeal. If the

¹⁸¹ These concerns are succinctly summarised in Tom Bennion "Waitangi Tribunal" (1996) *Maori Law Rev* (May) 3

¹⁸² The Attorney-General counters the arguments put forward by Maori by pointing out that Maori have won few recent cases before the Privy Council, Privy Councillors are (in practice) appointed by the British Prime Minister (rather than the Queen personally) and the Privy Council frequently remits Treaty of Waitangi cases to the New Zealand Court of Appeal for final determination: Colin James "Scales of Justice in our hands with end of Privy Council" (16 April 2002) *The New Zealand Herald*, Auckland, <<http://www.nzherald.co.nz>> (last accessed 27 August 2002).

¹⁸³ Report of the Attorney-General's Advisory Group "Replacing the Privy Council: A New Supreme Court" Office of the Attorney-General, Wellington, 2002, para 59.

report is the result of wide consultation within Maoridom and this proposal represents the culmination of that process, then it may be apt to appoint such a person to the bench. However, if it is merely a convenient method of ensuring "representation" on the bench to appease Maori then it clearly is not appropriate.

A number of issues arise even if such representation is considered appropriate, and there seem to be more questions than answers. For example, is there going to always be an appropriate appointee, with sufficient skills and expertise, for appointment to the Supreme Court? It would be in nobody's interest to appoint a Supreme Court judge merely on the basis of his or her cultural heritage, or ability in Maori language and culture. What will the ongoing system of ensuring Maori representation be? If there is no appropriately qualified appointee available when the incumbent Maori judge retires will a non-Maori judge be appointed? If so, for how long? Until a Maori appointee becomes available? It is readily evident that the appointment process will not be without difficulties.

The main question for the purposes of this paper is whether the legislation should be drafted so as to require Maori representation or whether it should express Maori appointment on some sort of preferential basis. To place a positive duty on the Attorney-General to ensure that the Supreme Court always had at least one Maori judge may be too high a goal and perhaps it would be more realistic to express it as a desire. It could perhaps be extended to cover all judicial appointments to ensure Maori representation in the judiciary generally is more equitable. It would arguably be more beneficial to Maori to have greater representation in the lower courts than merely in the Supreme Court. Over time the number of Maori judges would increase and there would be a greater "pool" of talent to draw from to sit on the higher benches.

If the latter approach is adopted, more Maori appointments to all courts, it should be extended to encompass all major ethnic groups in New Zealand. In New

Zealand the population is truly multi-cultural. There may well be arguments that the Supreme Court should have a Maori representative, but that begs the question of whether there should be representation for other groups, for example Pacific Islanders or Asians. This would be a starting point to assist in achieving a judiciary that reflected the ethnic composition of New Zealand, although it would clearly go no distance towards reflecting its socio-economic structure. There can be no argument that this will take place only over a fairly extended period, particularly given the disproportionately low number of Maori, Pacific Islanders and Asians currently in both the legal and non-legal professions and thus available for appointment to the judiciary.

As an alternative to appointment to the judiciary, there may be scope for the appointment of Maori advisers to the Supreme Court. This is already an option with respect to technical advisers to the Court of Appeal, but could easily be extended to cultural advisers (perhaps with a Maori lawyer being appointed as *amicus curiae*). The difference from the current system would be that such advisers would be mandatory in cases involving Maori issues. Again this could be extended to include all cultural groups. It could also serve to improve the knowledge of the judiciary on cultural issues.

My conclusion is that legislation to ensure Maori representation on the Supreme Court is not appropriate, but rather the appointment process¹⁸⁴ should be overhauled to ensure a more representative cross section of the multicultural New Zealand population.¹⁸⁵ In addition, the use of overseas judges may well serve to allay the fears of Maori.

¹⁸⁴ Or, if judicial elections are used, the candidature selection committee.

¹⁸⁵ The idea of a large Select Committee for this purpose has been suggested: B V Harris, "The Law-Making Power of the Judiciary" in Philip A Joseph (ed) *Essays on the Constitution* (Brooker's, Wellington, 1995) 280.

My inclination is that if Maori are to achieve more representation in the judicial system, it must be on the basis of a change to the appointment process in all courts. Making special provision for Maori only in the Supreme Court will not assist in the long run. What is required is a wholesale change to the appointment system to ensure an equitable reflection of the community in the judiciary generally. I anticipate that this would include representatives from the Maori, Pacific Island and Asian communities, as well as the "traditional" sources of appointment. The extension to the pool of potential judicial appointees to include non-lawyers would also be of assistance in assisting these groups to achieve more equitable representation in the judiciary.

VIII CONCLUSION

The abolition of the right of appeal to Her Majesty in Council and the decision to establish a New Zealand Supreme Court to fill that void presents New Zealand with a golden opportunity to rethink its appellate court structure. The discussion above shows that there are many options available either alone or in combination and the fact that a particular process has not been tried before should be no inhibition to its consideration.

The major issues to be addressed in the implementation of the suggestions in this paper are how limited term appointments to the Supreme Court could be made to work in practice and whether judicial elections would be a viable option. I am acutely aware that judges are currently appointed until retirement and the concept of a limited term appointment to the Supreme Court would inevitably attract little interest from that group, unless they were able to return to their previous judicial office, and even then it would be likely perceived as a demotion. Similarly with judicial elections.

The corollary is that one of the following propositions must apply:

- The judicial selection and appointment (or election) processes discussed in this paper must be applied to all courts. All appointments would then be made on the same basis and there would be no reason why candidates would be deterred.
- The salary and appointment conditions of Supreme Court judges should be made so attractive as to compensate for the "risk" of only remaining in office for seven years.
- The Supreme Court will attract a different "type" of potential appointee to the traditional judicial appointees. The introduction of non-legally qualified and overseas judges and limited term appointments would attract the type of appointees that would be willing to make a shorter term contribution to the judiciary and then return to practice.
- The concepts discussed in this paper are simply rejected and appointments to the Supreme Court are made in the same way as they are currently made to the High Court and the Court of Appeal.

However, careful thought should be given before resorting to the final proposition listed. In establishing the Supreme Court of New Zealand, the best of what other jurisdictions have developed over the years may be utilised and combined with innovative local ideas. If the suggestions contained in this paper were to be adopted, the new court could include judges from overseas appellate courts and from professions other than the law, as well as judges elected on a fixed term basis.

This paper is not intended to be a blueprint for the Supreme Court but rather an exploration of some of the possibilities that exist to innovate and develop a uniquely New Zealand method of constituting the Supreme Court. What is crucially important at this planning stage is to ensure that the issues are fully explored and

wide consultation is undertaken both within the judiciary and, perhaps more importantly, the wider community.

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